No. H047705

In the Court of Appeal of the State of California
Sixth Appellate District

WILLIAM HOBBS; SUSAN HOBBS;
DONALD SHIRKEY; and IRMA SHIRKEY,
Appellants/Cross-Appellees,

v.

CITY OF PACIFIC GROVE, CALIFORNIA;
BILL KAMPE, in his official capacity as the Mayor of the City of Pacific Grove; ROBERT HUITT, in his official capacity as a Councilmember of the City of Pacific Grove; KEN CUNEO, in his official capacity as a Councilmember of the City of Pacific Grove; RUDY FISCHER, in his official capacity as a Councilmember of the City of Pacific Grove; CYNTHIA GARFIELD, in her official capacity as a Councilmember of the City of Pacific Grove; BILL PEAKE, in his official capacity as a Councilmember of the City of Pacific Grove; and NICK SMITH, in his official capacity as Councilmember of the City of Pacific Grove,

Appellees/Cross-Appellants

On Appeal from the Judgment of the Superior Court
State of California, County of Monterey
Hon. Lydia M. Villarreal, Dept. 13
Case No. 18CV002411

APPELLANTS/CROSS-APPELLEES' OPENING BRIEF

Timothy Sandefur (224436)
Christina Sandefur*
Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, Arizona 85004
(602) 462-5000
Fax (602) 256-7445
litigation@goldwaterinstitute.org
*Admitted *Pro Hac Vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

This case is about whether California cities can suddenly and arbitrarily deprive responsible property owners—who are not accused of having committed any wrongdoing—of their legally vested right to rent their homes to overnight guests, particularly when the property owners detrimentally relied upon the existence of that vested right. The City did so here by selecting people by lottery to have their use rights nullified, in violation of due process.

In the proceedings below, the Superior Court held that the City of Pacific Grove ("the City") violated the California Coastal Act when it adopted an ordinance that divested property owners in the Coastal Zone of their rights without first seeking approval from the Coastal Commission.

But the court rejected the Appellants' argument that the City's revocation of their permits—pursuant to a random process that involved no consideration of whether the property owners committed any misconduct—also violated their rights to due process. It concluded that Appellants could not have any vested right in their license in the first place, because that license was subject to renewal at 12-month intervals. Since the permit had to be periodically renewed, the Superior Court said, the Appellants could have no vested right and therefore the revocation of their permits through a literally random process could not violate their right to due process.

Appellants contend that this holding was legal error because under the circumstances present here, the Appellants did

have a vested right. The fact that a permit must be renewed does not mean the permit holder has no vested right. *See, e.g.*, *Goat Hill Tavern v. Costa Mesa*, 6 Cal.App.4th 1519, 1529-30 (1992). Instead, vested rights determinations are based on reliance interests and other considerations, *Avco Cmty. Devs., Inc. v. S. Coast Reg'l Comm'n*, 17 Cal.3d 785, 791 (1976); *Traverso v. People ex rel. Dep't of Transp.*, 6 Cal.4th 1152, 1162 (1993), and the court below erred in not addressing these factors or whether the random revocation of Appellants' licenses violated due process. The Appellants have appealed that sole issue, and ask this Court to reverse and remand.

STATEMENT OF THE CASE

William and Susan Hobbs and Donald and Irma Shirkey ("Appellants") filed this action against the City in Monterey County Superior Court on June 26, 2018, seeking declaratory and injunctive relief to protect their existing rights to peacefully and responsibly allow overnight guests in their homes for short periods of time. They argued, first, that the City's adoption and enforcement of Ordinance 18-005 (I CT 211–14) [1]—which, among other things, employed a random lottery to select existing short-term rental (STR) permit holders to have their rights revoked—violated both their constitutional due process rights and the California Coastal Act.

On December 28, 2018, Appellants filed an Amended Complaint to challenge the subsequently enacted "Initiative to

[1] The Clerk's Transcript on Appeal will be referred to as [Vol.] CT [Page] throughout this brief.

Preserve and Protect Pacific Grove's Residential Character" (Measure M). I CT 228–27. Appellants then moved for summary judgment and/or adjudication on both counts.

Count One contended that adoption of Ordinance 18-005 violated the California Coastal Act because the City did not seek approval from the Coastal Commission before enacting and enforcing it. The Superior Court agreed, and ruled for Appellants on Count One. III CT 649.

Count Two contended that the City violated Appellants' substantive and procedural due process rights by enforcing Ordinance 18-005 and Measure M. **First**, the City selected which permit-holders would be stripped of their permits under Ordinance 18-005's 15% STR density cap by holding a lottery, meaning that Appellants were deprived of their rights to rent their homes to overnight guests pursuant to an entirely random process that included no consideration of fault and gave Appellants no opportunity to be heard. **Second**, Measure M, which subsequently prohibited and phased out previously permitted STRs in residential districts outside the Coastal Zone—including those belonging to Appellants William and Susan Hobbs—permanently and arbitrarily deprived the Hobbses of their vested right to rent, without any connection to public health, safety, or welfare.

The Superior Court denied Appellants' summary judgment motion with respect to Count Two, specifically holding that: (1) there were no relevant disputes of material fact, and the sole relevant piece of evidence was the contents of Appellants' permit,

I Rptrs. Tr. 22:2–6[2]; (2) Appellants' due process argument "is a legal issue" rather than a factual one; and (3) as a matter of law, Appellants could not have "a procedural due process or a substantive due process right to renew [their 12-month permit] ... . [W]hatever rights the Plaintiffs have are dictated by the permit, and the permit only gives them 12 months." I Rptrs. Tr. 22:2–6, 29:28–30:3.

In its ultimate order, the court concluded that Appellants could not overcome the threshold legal issue: that is, that they do not "have a substantive or procedural due process right to renew the time-limited short-term rental licenses." III CT 649. This appeal followed.[3]

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[2] The Reporter's Transcript on Appeal will be referred to as [Vol.] Rptrs. Tr. [Pg.:Line] throughout this brief.

[3] Because the Superior Court ruled that Appellants had no vested right, and therefore, as a matter of law, *could not* establish a substantive or procedural due process right with respect to their permits, the City was entitled to judgment with respect to Count Two. The City, however, refused either to move for judgment to that effect or to enter into a stipulated judgment, insisting instead upon trial despite the Superior Court's conclusion that there were no disputed issues of material fact. I Rptrs. Tr. 22:2–6. Appellants therefore filed a motion *in limine* to (a) exclude from evidence everything it had already declared irrelevant, and (b) enter judgment in favor of the City and against Appellants with respect to Count Two. The court denied that motion without explanation. Observing that it would be "'wasteful of trial court time' to require [Appellants] to undergo a probably unsuccessful court trial merely to obtain an appealable judgment," *Building Industry Association v. City of Camarillo*, 41 Cal.3d 810, 817 (1986), Appellants therefore voluntarily dismissed Count Two with prejudice—making clear in their request for dismissal that they were doing so solely "in order to expedite an appeal of the

STATEMENT OF APPEALABILITY

As explained in more detail in Appellants' Opposition to Appellees' Motion to Dismiss this appeal (dated March 16, 2020), this appeal is from the dismissal of Count Two of Appellants' complaint (*see* IX CT 1877–78). Plaintiffs dismissed that count due solely to the Superior Court's determination that Appellants cannot prevail on that Count as a matter of law (III CT 649), and the denial of their Motion in Limine (IX CT 1866). This appeal is therefore authorized as described in *Stewart v. Colonial Western Agency, Inc.*, 87 Cal.App.4th 1006, 1012 (2001) (voluntary dismissal is appealable if entered "after an adverse ruling by the trial court in order to expedite an appeal of the ruling."); *accord, Ashland Chemical Co. v. Provence*, 129 Cal.App.3d 790, 793 (1982).

STATEMENT OF FACTS

I. Short-term rentals in Pacific Grove

Pacific Grove is a small beach-front town with popular tourist attractions, including an award-winning natural history museum and a nationally famous golf course. It is a popular vacation destination. III CT 590–91 ¶ 1. Short-term vacationers,

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ruling." *Stewart v. Colonial W. Agency, Inc.*, 87 Cal.App.4th 1006, 1012 (2001). The City opposed Appellants' voluntary dismissal, but the Superior Court granted it, whereupon this appeal followed. The City then filed in this Court a Motion to Dismiss the appeal, which Appellants opposed, and which this Court denied on August 25, 2020.

Due to administrative delays in the Superior Court, the record of appeal was filed with this Court on February 3, 2021, and this brief was subsequently and timely filed.

who stay as guests in residential homes for fewer than 30 days, have always been a part of the community's population, and informal short-term vacation rentals have always been popular in Pacific Grove, even before the City formally recognized and permitted them. The City's own website boasts of the availability of vacation rentals for tourists, *Id.* 591 ¶ 2, and STRs have provided a significant and growing source of revenue for the City. *Id.* 605 ¶¶ 14-16.

Online rental platforms like Vrbo and Airbnb have made it easier and cheaper for tourists to obtain STR accommodations. Property owners use these platforms to advertise their willingness to share their homes, and vacationers use these platforms to reserve homes, pay for staying, and leave feedback about the quality of their stay. *Id.* 593 ¶ 3. This feedback from renters is made publicly available by Vrbo, Airbnb, and similar platforms. As a result, property owners have strong incentives to keep their properties clean and in good repair. *Id.* 593–94 ¶ 4. Airbnb has an online hotline that allows neighbors to file complaints about noisy guests, parking violations, etc. *Id.* 595 ¶ 5.

Between when the City began licensing STRs in 2010 and when it began enforcing Ordinance 18-005 in 2018, the number of legal, licensed short-term rentals in Pacific Grove steadily increased. *Id.* 600, 612 ¶¶ 8, 9, 37. Yet the number of verified complaints regarding noise, parking violations, or other nuisances in short-term rentals remained minimal. *Id.* 600 ¶¶ 8-9. Before the City passed Ordinance 18-005, STRs (both legal and

illegal) made up only about 4% of the City's housing stock. *Id.* 596 ¶ 6. In fact, City staff determined that STRs are residential uses, and are not inconsistent with Pacific Grove being a "City of homes." *Id.* ¶ 7.

STRs have had little or no negative impact on housing affordability in Pacific Grove. *Id.* 603–4 ¶ 12. The city has long experienced a lack of affordable housing, and there is no evidence that STRs have caused or increased this lack. On the contrary, the ability to offer properties as short-term rentals enables the owners of those homes to afford to purchase or remain in their homes when they might not otherwise have been able to do so. STRs also contribute to the community by minimizing the number of second homes that remain vacant for extended periods. *Id.* 603 ¶ 11. Indeed, before the City enacted Ordinance 18-005, 70% of licensed STRs in Pacific Grove were second homes, and 51% of those owners would have left those homes vacant if they had not been allowed to rent them on a short-term basis. *Id.* 603–4 ¶ 12.

Even City staff "conclusively conclude[d]" in August 2017 "that the Short Term Rental Program has NO significant effect on the affordability of housing in Pacific Grove." *Id.* (emphasis in original).

A. Sea Dance

Appellants William and Susan Hobbs own a home they call "Sea Dance" at 1135 Ocean View Blvd, in Pacific Grove, outside of the Coastal Zone. *Id.* 605 ¶ 17. Susan's family has owned Sea Dance since her parents bought it over 50 years ago. *Id.* ¶ 18.

Susan's mother moved into an assisted living facility in 2013, whereupon Susan obtained a STR license from the City and offered Sea Dance for rent through a property management company. *Id.* 606 ¶ 19. She used the income from the rentals to pay for her mother's care until her mother's death. *Id.* ¶¶ 19, 21.

Before they could rent out Sea Dance, Susan and William had to conduct approximately $50,000 worth of repairs and improvements. *Id.* ¶ 20. They did this based on the reasonable expectation that they could recover the repair costs through by renting Sea Dance on a short-term basis. Given these costs, and because they wanted to keep the home for future use as a primary residence, Susan and William continued to offer the home for rent on a short-term basis after Susan's mother's death. *Id.* 606–7 ¶¶ 20–21.

Sea Dance has been a popular rental home, with a 74% occupancy rate in 2017. It is ideal for STRs, as it is located on the ocean and has ample parking. *Id.* 607 ¶ 22. The average rental was for three days, although renters sometimes stayed for weeks. *Id.* ¶ 23. In her five years of renting Sea Dance, Susan never received a complaint about her renters from the City or anyone else. Her renters have never damaged the home or property. *Id.* ¶ 24. William and Susan maintained their license in good standing until the City—which has never made any allegation that they engaged in any wrongdoing or misuse of their property—took away that license pursuant to Ordinance 18-005's lottery, *Id.* ¶ 25, as discussed below.

B. The Shirkey Property

Appellants Donald and Irma Shirkey own a home at 105 5th St. (the "Shirkey Property"), inside the Coastal Zone in Pacific Grove. They purchased it in 1999 as a home for their children and grandchildren to use when they visit. To cover costs, they rent the home out when their family is not occupying it. *Id.* 608 ¶ 27. The Shirkey Property is a two-story, single family-home with a small guest quarters over the garage. Donald and Irma often rented it as a single unit, and the City only required one STR license when it was first licensed in 2010. *Id.* 608–9 ¶ 28.

Donald and Irma obtained a license when the City first began licensing STRs in April 2010. *Id.* ¶ 29. In 2016, the City for the first time required them to obtain two licenses: one for the main house, and one for the guest quarters over the garage. *Id.* 610 ¶ 34.

On average, their guests stay for three days, although renters sometimes stay for weeks. Only once since 2010 did Donald and Irma have renters stay for more than a month. *Id.* 609–10 ¶ 31. In their eight years offering the Shirkey Property as an STR, Donald and Irma never received a complaint about renters from the City or anyone else. *Id.* 610 ¶ 32. The City has never claimed that they engaged in any wrongdoing or misuse of their property. The Shirkey Property has received excellent reviews from renters on online home-sharing sites. *Id.*

To offer the Shirkey Property as an STR, Donald and Irma made expensive repairs and improvements, including installing new decks and replacing and upgrading appliances. *Id.* 609 ¶ 30.

Being able to offer the Shirkey Property as an STR enables Donald and Irma to keep a well-maintained property for their children and grandchildren to visit, so that they do not have to spend money staying in a hotel, and, when their family is not visiting, to obtain income for purposes of maintaining the property. *Id.* 611 ¶ 35. Donald and Irma Shirkey maintained both licenses in good standing until the City took one of them away pursuant to Ordinance 18-005's lottery. *Id.* ¶ 36.

II. The City's anti-home sharing ordinances.

STRs have been permitted and licensed in Pacific Grove since 2010, when the City enacted Ordinance 10-001. *Id.* 612 ¶ 37. At that time, the City required homeowners to obtain and maintain a Transient Use License to offer their homes as STRs. *Id.* 613 ¶ 38. That Ordinance established that Transient Use Licenses would not be revoked unless the license-holder committed specific, enumerated misconduct or violations.[4] The Ordinance provided that even if misconduct had occurred, the licensee could still renew his or her license upon the presentation of substantial evidence that the license should not be revoked. A person whose permit had been suspended or revoked is entitled to a hearing before the City Manager. *Id.* 614–15 ¶ 39.

In 2015, the City placed a 45-day moratorium on new STR license applications. In doing so, however, it specified that "[r]enewal of existing permits shall not be inhibited by this measure." *Id.* 617 ¶ 41. Later that year, the City Council resolved

[4] No violations of any sort are alleged against the Appellants or are involved in this case.

to consider recommendations to amend Ordinance 10-001. *Id.* ¶ 42.

The next year, the City enacted Ordinance 16-007, which created two STR categories, Type A (in which an entire house is non-owner occupied and is rented for 90 days or more per year), and B (for rental of an entire house for 90 days or less, and/or in which the home is owner-occupied when not rented). The Ordinance capped Type A STR licenses so that no more than 250 would be issued, and also established density limits to restrict the number of new Type A STR licenses. It grandfathered in existing STR licenses, however, regardless of whether the total number of licenses exceeded the 250 cap or density limits. *Id.* 617–18 ¶ 43. Both Type A and Type B STR licenses were issued on a ministerial basis. *Id.* 618 ¶ 44.

In December 2016, the Coastal Commission sent a letter to all planning and community development directors in the Coastal Zone, including Pacific Grove, stating that "vacation rental regulation in the coastal zone *must* occur within the context of your [LCP] and/or be authorized pursuant to a coastal development permit (CDP)." *Id.* 619 ¶ 45. Nevertheless, in 2017, the City resolved to further amend its General Plan with regard to STRs in residential zones. It specified that if STR licenses exceeded the 250 cap, new license applications would be placed on a waiting list. *Id.* 621 ¶ 47.

In February 2018, the City adopted Ordinance 18-005, which is the subject of this lawsuit. That Ordinance imposes, *inter alia*, a 15 percent density cap, as well as Zones of Exclusion,

and a procedure for determining whether properties exist in "over-dense blocks." *Id.* 621–22 ¶ 48.[5] Ordinance 18-005 also reduced the number of licensed STRs in Pacific Grove by requiring the City Manager to "conduct a lottery" to select which existing permits would be revoked.[6] *Id.* 623 ¶ 50. The Ordinance provides for no post-deprivation process for appealing or challenging the revocation of a permit.

The first lottery occurred on May 22, 2018. This lottery consisted of a ping-pong ball style machine which the City used to randomly select 51 license-holders to have their existing permits terminated on April 30, 2019. These permit-holders would thereafter be ineligible to apply for new permits (or renew their existing permits) until such time as those permit holders whose

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[5] The City did not submit this ordinance to the Coastal Commission for approval before enacting and enforcing it. *Id.* 622 ¶ 49. Thus Appellants charged in Count One of their complaint that the Ordinance constituted "development" and that the City violated the Coastal Act by failing to obtain Commission approval. The Superior Court ruled for Plaintiffs on that Count. Subsequently, the City submitted the issue to the Commission for approval. On November 15, 2019, the Commission approved the City's Local Coastal Program, including the 2018 Ordinance. https://coastal.ca.gov/meetings/agenda/#/2019/11.

[6] The Community and Economic Development staff stated in August 2017 that a lottery would be "arbitrary and capricious and will possibly remove some very good [STRs]." Staff instead recommended that licenses in areas that exceed the 15 percent density limit be subjected to a "scoring system" that "weeds out the marginal or troublesome licenses" based on complaints. *Id.* 624 ¶ 51. The Planning Commission also recommended in August 2017 that the City "revise the STR checklist and make it a useful tool in city assessment and management, rather than a lottery system," and grandfather existing licenses that "meet the required standards." *Id.* 625 ¶ 52.

numbers were not chosen by the lottery relinquished their permits. *Id.* 626 ¶¶ 54–55.

This lottery-style process for depriving existing permit-holders of their rights took no consideration of how long a person had been renting his or her home, or whether the permit-holders or their guests had caused disturbances—or any other factor. It was entirely random. As a result, owners who had incurred numerous complaints could be allowed to keep their permits, while responsible homeowners and long-time renters, including Appellants, were stripped of theirs. *Id.* 624 ¶ 51.

As a result of the May 2018 lottery, Appellants' permits were selected for revocation on April 30, 2019. Both of Donald and Irma Shirkey's licenses were included in the lottery—meaning that these two licenses were essentially competing against each other. One was selected, and one was not, meaning that they were only allowed to keep a license to rent one portion of their property. *Id.* 627 ¶ 56.

On November 6, 2018, Pacific Grove voters approved Measure M, which prohibits and phased out, over an 18-month period, *all* existing permitted STRs in residential districts, except inside the Coastal Zone. *Id.* 628 ¶ 60. As a result of Measure M, Appellants William and Susan Hobbs, whose property is not located in the Coastal Zone, were permanently prohibited from renting Sea Dance short-term. *Id.* 630 ¶ 62.

STANDARD OF REVIEW

The sole issue before this Court is a legal one: whether Plaintiffs had a vested right for purposes of due process. The

Superior Court concluded as a matter of law that they did not, because these permits were valid for twelve months and were subject to renewal. Because this case requires the application of law to undisputed facts, this Court applies de novo review. *Kong v. City of Hawaiian Gardens Redevelopment Agency*, 101 Cal.App.4th 1317, 1325 (2002).

ARGUMENT

I. Ordinance 18-005 violates Appellants' due process rights.

The Due Process Clauses of the California and U.S. Constitutions protect Appellants' right to use their private property. That right may be regulated, but such regulations must comply with both procedural and substantive due process protections. Because Ordinance 18-005 arbitrarily deprives them of a vested right, it violates these procedural and substantive due process guarantees.

A. Appellants had vested rights that could not be arbitrarily revoked.

"[A] land owner has a vested right to use his property in accordance with the terms of his permit, and … a valid permit once issued cannot be arbitrarily revoked." *Spindler Realty Corp. v. Monning*, 243 Cal.App.2d 255, 267 (1966). In determining whether a vested right exists, the question is not whether the permit has an expiration date, but "whether the affected right is deemed to be of such significance that it should not be extinguished by a body lacking in judicial power." *Malibu*

Mountains Recreation, Inc. v. Cnty. of L.A., 67 Cal.App.4th 359, 367 (1998). Here, the Appellants have a vested right.

When Ordinance 18-005 was enacted and they received their licenses, they acquired the right to use their properties as STRs—and detrimentally relied on that right by sacrificing thousands of dollars and numerous hours to improve and maintain the properties to offer as STRs, and by regularly renting out their homes. They maintained their permits in good standing, never committing infractions or nuisances, and spending extensive time and effort in operating their STRs. *See Avco Cmty. Devs., Inc.*, 17 Cal.3d at 791 ("if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right"); *Clerici v. Dep't of Motor Vehicles*, 224 Cal.App.3d 1016, 1023 (1990) (vested rights are defined "in terms of a contrast between a right possessed and one that is merely sought"). *See also Berlinghieri v. Dep't of Motor Vehicles*, 33 Cal.3d 392, 396 (1983) ("[b]usiness or professional licensing cases have distinguished between the denial of an application for a license (nonvested right) and the suspension or revocation of an existing license (vested right)").

The court below erred in holding that they had no rights protected by due process simply by virtue of the fact that their permits were subject to renewal in twelve-month increments. I Rptrs. Tr. 22:2–6, 29:28–30:3. The fact that a permit must be renewed does not mean that the holder has no vested right in that permit. *See Goat Hill Tavern*, 6 Cal.App.4th at 1529-30 (that

a permit had to be renewed did not change the fact that permit holder had a vested right); *Pardee Const. Co. v. Cal. Coastal Comm'n*, 95 Cal.App.3d 471, 481-82 (1979) (developer still had a vested right even though it allowed permit to lapse).

Instead, the question is one of reliance. *Avco Cmty. Devs., Inc.*, 17 Cal.3d at 791 (where "a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit."). Vested rights outlive the permit upon which they are based, due to their vested nature. In other words, due process protects the Appellants' *interests*, not their permits specifically. *Traverso*, 6 Cal.4th at 1162 ("Once a permit has been issued, its continued possession becomes a significant factor in the [possessor]'s legitimate pursuit of a livelihood. The revocation of a permit thus … cannot be accomplished without affording the procedural due process required by the Constitution.").

It is undisputed that Appellants would have been entitled to the renewal of their licenses upon the expiration of the twelve-month period, because the City itself considered STR licenses to be "ministerial and issued over the counter," III CT 618 ¶ 44, and the Appellants never committed misconduct or violations that would have subjected them to revocation or nonrenewal. *Id.* 607 ¶ 24, 610 ¶ 33. Their right to use their properties was therefore a vested right "of which [they] may not be deprived arbitrarily without injustice." *Doe v. Cal. Dep't of Justice*, 173 Cal.App.4th 1095, 1106 (2009) (citation omitted).

In *Goat Hill Tavern*, a business owner sued when the city denied its application to renew its business permit. 6 Cal.App.4th at 1522. The city argued that the owner had no vested right in the permit, given the fact that it had to be renewed. *Id.* at 1526. The court emphasized that the question could not be resolved on the formalistic basis that the permit was subject to renewal. Instead, in determining whether a person had a vested right, a court must examine the degree to which the permit holder acted "in reliance on the permit," and the degree to which the permit holder's "rights [are] impacted by [the government's] denial of … [the] renewal application." *Id.* at 1527.

In fact, the court found that the "[d]enial of an application to renew a permit" actually "merits a heightened judicial review," because revocation of the right to renew "is far more serious than the interference a property owner experiences when denied a conditional use permit in the first instance." *Id.* at 1529-30. The same principle applies here. These Appellants spent money in reliance on their permits, undertaking expensive and extensive renovations of their property to make use of their right to rent. III CT 606 ¶ 20, 609 ¶ 30. They operated for years without complaints, *Id.* 607 ¶ 24, 610 ¶¶ 32–33, renewed their licenses repeatedly, *Id.* 606 ¶ 19, 607 ¶ 25, 609 ¶ 29, 610 ¶¶ 34, 36, and detrimentally relied on the fact that their licenses would be renewed so long as they met the requirements. *Id.* 606 ¶ 20, 627–28 ¶¶ 57, 59. As in *Goat Hill Tavern*, therefore, the nullification of their right to renew their permits is "more like the revocation of a conditional use permit than the mere issuance of one." 6

Cal.App.4th at 1530. As in that case, these Appellants have a vested right even though their permit must be renewed.

In *Malibu Mountains Recreation, Inc. v. Cnty. of L.A.*, 67 Cal.App.4th 359 (1998), the county granted a conditional use permit to a business, which it later revoked. The county argued that the business owner had no vested right, because it was not actually using the property for the purposes approved in the permit, and because it could still seek a new permit. *Id.* at 369. The court, however, found that the question of whether a person has a vested right is to be determined based on "the nature of the right rather than the actual amount of harm." *Id.* The business had "acted in reliance on the [permit]," and therefore had acquired a vested right. *Id.* at 370. Here, the Appellants have an even stronger case, because they relied economically on the permit and continually used that permit up to the point at which the City essentially revoked it.

Many other cases have also held that the vested rights determination depends on an analysis of reliance interests and on the weight of those interests—rather than a formalistic determination of whether the permit included a time limit. *Bauer v. City of San Diego*, 75 Cal.App.4th 1281, 1296 (1999) ("the City could not properly deem Bauer's grandfathered rights automatically terminated without providing Bauer with an opportunity to be heard."); *San Benito Foods v. Veneman*, 50 Cal.App.4th 1889, 1897 (1996) (because "the nature of the right itself was crucial to plaintiff's economic viability as a food

processor," vested rights were at issue and government could not terminate license).

Unlike cases such as *Metro. Outdoor Adver. Corp. v. City of Santa Ana*, 23 Cal.App.4th 1401, 1404 (1994), where the business involved expressly agreed to cease activities at a specified time and made "no assertion" that this would harm its business, these Appellants did *not* agree to cease operating their STRs at a future date. For the city to terminate their right to seek renewal of their licenses completely destroyed their income from their STRs.[7]

Whenever government "deprive[s] an individual of an important interest, it may not do so without affording the procedural due process." *Traverso*, 6 Cal.4th at 1162. Appellants obtained STR permits, relied upon them to their cost, complied with the terms of those permits, and committed no wrongdoing—and now have lost their STR income without them. They have the same vested right that was recognized in cases like *Goat Hill Tavern*, *Malibu Mountains*, and *Bauer*—and of which the City cannot constitutionally deprive them without at least giving them an opportunity to be heard on the merits.

B. Ordinance 18-005 deprives Plaintiffs of their rights without any rational process.

Ordinance 18-005 arbitrarily eliminates Plaintiffs' vested rights without any proceeding, and without regard to whether their properties have been the source of nuisances or other harms

[7] Although the City has concluded that STRs are a residential use, III CT 586 ¶ 7, the analogy to a business remains, given that these Appellants depended on the income from renting on a short-term basis.

to public health, safety, or welfare. Indeed, it is hard to imagine a more blatant example of an arbitrary deprivation of a vested right than a system whereby law-abiding permit-holders are randomly selected by lottery to have their vested rights annulled without any consideration of the merits.

Since obtaining their permits, Appellants rented their homes without complaint or violation, and the City has never claimed that they caused a nuisance or otherwise met any factors justifying the revocation of their rights. As vested rights-holders, due process requires *at a minimum* that they be given notice and an opportunity to be heard. *Horn v. Cnty. of Ventura*, 24 Cal.3d 605, 612–615 (1979). The City's decision to *randomly* select Appellants to have their vested rights annulled without consideration of fault, or opportunity to contest the revocation on the merits, violates due process. *Berlinghieri*, 33 Cal.3d at 396 ("Once an agency has exercised its expertise and issued a license, the agency's subsequent revocation of that license generally calls for an independent review of the facts, because revocation or suspension affects a vested right.").

There may be times when a random process is constitutional,[8] but not when it comes to applying land use

[8] A lottery system is consistent with due process where the participants do not have any legitimate claim of entitlement. *See, e.g.*, *Wawrzynski v. City Of San Diego*, No. D059336, 2012 WL 1201902, at *4 (Cal. App. Apr. 11, 2012). That is not the case here, since the Appellants had vested rights. Also, a process that randomly deprives individuals of their property rights may be constitutional under some circumstances, so long as an adequate post-deprivation remedy is made available. *Alexander v. Ieyoub*,

regulations to specific parcels of property, without any consideration of distinctions among those properties. The City's enforcement of zoning rules must bear some reasonable connection to the problems the City purports to address. *O'Hagen v. Bd. of Zoning Adjustment*, 19 Cal.App.3d 151, 165 (1971). Because the City simply revoked the Appellants' permits without any consideration or determination of fault on their part, the City violated their procedural due process rights.

The City appears to have believed that it could simply deem STRs a nuisance and on that basis eliminate them without affording due process to existing rights-holders. But while a city certainly has power to eliminate nuisances, it cannot "'by its mere declaration that specified property is a nuisance, make it one when in fact it is not.'" *Leppo v. City of Petaluma*, 20 Cal.App.3d 711, 718 (1971) (citation omitted). Applying Ordinance 18-005 to Appellants is an adjudicative act, meaning that the permit holders are entitled to due process. *Horn*, 24 Cal.3d at 614. Thus, it is by definition arbitrary to disregard whether or not they actually committed nuisance and to eliminate their rights in a random fashion. As the Supreme Court said *Fascination, Inc. v. Hoover*, 39 Cal.2d 260, 270 (1952), the idea that the City could deny or revoke a permit "without a hearing on the merits … with or without reason, or upon ex parte statements or rumors, with no opportunity of refuting them" is "preposterous" and is "not the purpose or spirit with which regulatory statutes are enacted."

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62 F.3d 709, 712 (5th Cir. 1995). No such remedy is available here.

Not only did the City disregard the "'fundamental requirement[] of procedural due process,'" *Alviso v. Sonoma Cnty. Sheriff's Dep't*, 186 Cal.App.4th 198, 209 (2010) (citation omitted), but under the random lottery that it used, STR operators who *did* cause nuisances could be allowed to keep their licenses, while those who—like Appellants—committed none could be stripped of their permits.

Because of the longstanding principle that a city cannot simply declare something a nuisance when it is not, *Leppo*, 20 Cal.App.3d at 718, land use regulations typically "exempt existing uses to avoid questions as to the constitutionality of their application to those uses." *Hansen Bros. Enters., Inc. v. Bd. of Supervisors*, 12 Cal.4th 533, 552 (1996). And the City did previously grandfather in existing license holders in its previous STR ordinance. III CT 617–18 ¶ 43. In 2017, members of the City Council, the Director of Community and Economic Development, and city staff all urged the City to do so again, noting that it would be more consistent with due process to reduce the number of STRs by eliminating existing licenses as necessary through a scoring system that would focus on properties actually committing nuisances, or by gradually phasing out licenses as owners sell or cease to rent their properties. *Id.* 625 ¶ 52. That would have comported with due process. *See, e.g., San Diego Cnty. v. McClurken*, 37 Cal.2d 683, 686 (1951) (grandfathering preferred, especially if it provides for "the gradual elimination of the nonconforming use by obsolescence or destruction" (citations and quotations omitted)). But the City did not do that.

Instead, it capped the number of STR licenses, imposed density limits, and then subjected those over that threshold to a random lottery whereby their licenses were revoked—and their reliance interests erased—with no consideration of merit or opportunity to be heard. The City placed all existing permit holders in a ping-pong ball machine and then drew the names of those whose existing and vested rights to rent their property would be nullified—a quintessential deprivation of procedural due process. *Pietsch v. Ward Cnty.*, 446 F.Supp.3d 513, 539 (D.N.D. 2020) ("Truly irrational government action 'bear[s] no relationship whatever to the merits of the pending matter' … [such as] making zoning decisions by coin toss or applying an ordinance exclusively to those whose names begin with a letter in the first half of the alphabet." (citations omitted)); *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299 (9th Cir. 1992) ("[I]t would offend common notions of justice to have [certain legal decisions] made on the basis of a dart throw, a coin toss or some other arbitrary or capricious process.").

Not only did the City randomly choose which vested rights to eliminate, but it also arbitrarily chose to count the Shirkeys' single-family home as two separate rental properties for purposes of its lottery, even though the home is usually rented as a single unit—thereby forcing them to compete against themselves in the lottery. III CT 608–9 ¶ 28, 627 ¶ 56. Such a procedure violates the very basics of procedural due process.

C. Revoking Appellants' licenses without any connection to public health, safety, and welfare, also violated their substantive due process rights.

In addition to denying the Appellants their procedural due process right to be *heard* on the merits, the nullification of their vested rights was done without *regard* to the merits—thereby also depriving Appellants of their right to *substantive* due process.

The government may not eliminate a vested right for reasons that have "'no substantial relation to public health, safety, morals or general welfare.'" *Guinnane v. S.F. City Planning Comm'n*, 209 Cal.App.3d 732, 741 (1989) (citation omitted). Eliminating Appellants' right to rent their properties lacks such a relationship to a legitimate public interest. As noted above, they have never engaged in or allowed any nuisance on their properties, or violated the terms of their permits, or otherwise disturbed the peace, and the City does not claim otherwise. Instead, it asserts that revocation of the Appellants' permits is necessary to reduce housing costs in the City and to preserve "domestic tranquility." II CT 342. Neither of these arguments is persuasive.

There is no basis for the assumption that restricting Appellants' right to allow guests to stay in their homes will serve the City's interest in preserving affordable housing. As a matter of common sense, forbidding residential property owners from letting guests stay in their homes will not make those properties available as affordable housing. On the contrary, it will result either in the property owners leaving their properties *vacant*

during certain times (likely resulting in deterioration), or in their being unable to afford their homes—which is the very opposite of the alleged government purpose. *See* III CT 603–4 ¶ 12.

The City's own staff "conclusively conclude[d]" in 2017 "that the Short Term Rental Program has NO significant effect on the affordability of housing in Pacific Grove." *Id*. And the League of Cities has agreed that there is no evidence to show that home-sharing affects the affordability of housing. Lauren Hirshon, et al., *Cities, The Sharing Economy and What's Next* 18 (National League of Cities 2015). As the federal district court observed in a similar context, the cause of high housing costs is limited supply, which results from "entrenched market forces and structural decisions made by the City"—and the "market effect" of Appellants' rentals "is infinitesimally small." *Levin v. City & Cnty. of S.F.*, 71 F.Supp.3d 1072, 1084–85 (N.D. Cal. 2014). While the City certainly has broad discretion when setting economic policy, it cannot prohibit property uses whose relationship to the underlying social problem is negligible or infinitesimally small. *DeYoung v. Providence Med. Ctr.*, 960 P.2d 919, 926 (Wash. 1998); *Rodriguez v. Brand W. Dairy*, 378 P.3d 13, 26 (N.M. 2016).

As for "domestic tranquility," it is undisputed that the Appellants' properties have never been the source of any nuisances or complaints of any sort. III CT 607 ¶ 24, 610 ¶ 33. Arbitrarily depriving them of their permits on the theory that they *might* cause *future* nuisances—without regard to the fact that existing city laws already prohibit nuisances and alternative means exist to remedy such concerns should they arise—violates

rational basis. *See, e.g,* *Edwards v. D.C.*, 755 F.3d 996, 1006 (D.C. Cir. 2014) (licensing requirement for tour guides failed rational basis because, among other things, existence of "numerous consumer review websites, like Yelp and TripAdvisor, which provide consumers a forum to rate the quality of their experiences" ensured that tour guides would provide quality services.); *cf.* *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F.Supp.2d 1123, 1131 (C.D. Cal. 2001) (city could not "condemn property that is *not blighted* solely to prevent some unidentifiable 'future blight' that may never even materialize.").

Even if Appellants had engaged in nuisances, revoking their permits rather than addressing those nuisance behaviors would still violate their substantive due process rights. In *O'Hagen v. Bd. of Zoning Adjustment*, 19 Cal.App.3d 151 (1971), the property owner ran a restaurant in Santa Rosa, pursuant to a permit. Years later, complaints about the restaurant's operations rose to the level that the city brought a public nuisance complaint, and prevailed. It then sought to revoke the permit. The Court of Appeals ruled that this was not proper. Once a property owner has a vested right, it could only be eliminated where "a compelling public necessity" required that. *Id.* at 158–59. While a city could abate or punish nuisances, it could not revoke the underlying permit without showing that "the interests of the public generally require such interference and that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Id.* at 159 (citation omitted). The fact that the property owner had been

punished for previous nuisances and had taken steps to remedy the situation showed that "a compelling necessity did not exist to totally prohibit plaintiff from operating his [restaurant]." *Id.* at 165.

Like the property owner in *O'Hagen*, Appellants in this case have a vested right to rent their properties. There is no "compelling necessity" or even a rational connection between eliminating that vested right and addressing affordable housing in the City. Since the City implemented its program nine years ago, III CT 612 ¶ 37, short-term rentals have always made up a small amount of the City's housing stock, *Id.* 596 ¶ 6, and it has no significant effect on affordable housing, *Id.* 603–4 ¶ 12.

Because Appellants' possessed vested rights in continuing to conduct STRs, they cannot be deprived of those rights without being afforded substantive and procedural due process. The City deprived Appellants of those rights by enacting and enforcing Ordinance 18-005.

II. Measure M violates Appellants' due process rights.

In addition to enacting and enforcing Ordinance 18-005, the City has also violated Appellants' William and Susan Hobbs's right to due process by prohibiting *all* homes outside the Coastal Zone from being offered as STRs, and phasing out all existing permitted STRs, without consideration of fault or opportunity to be heard on the merits.

As explained above, nullifying existing permits for short-term rentals, without grandfathering existing permit-holders who are in good standing, violates due process and bears no

relationship to public health, safety, or welfare. But Measure M goes even further than Ordinance 18-005. Rather than revoking a percentage of STR permits, it imposes a complete prohibition against *all* short-term rentals outside the Coastal Zone, even those that were previously permitted and have operated for years without incident. Such an across-the-board prohibition of the use of property, without consideration of fault and without any rational relationship to public health, safety, or welfare, is unconstitutional. *O'Hagen*, 19 Cal.App.3d at 165.

In *People ex rel. Younger v. Cnty. of El Dorado*, 96 Cal.App.3d 403 (1979), El Dorado County made it illegal "to float, swim or travel" in a 20-mile section of a river to address the concerns of neighboring property owners who complained that rafters caused noise, litter, pollution and unsanitary conditions. The Court of Appeals struck down the ordinance because, although it may have eliminated pollution and sanitation problems, such a total prohibition of access was excessive. Although the public "has no right to pollute the river," it did have "a right to use the river." *Id.* at 407. Likewise, here, property owners have the right to offer their homes to overnight guests, especially when they possess a valid permit and have committed no nuisances. In such cases, "[r]easonable regulation is in order; use prohibition is not." *Id.* Measure M completely prohibits STRs outside the Coastal Zone, and deprives people of their existing vested rights to rent. III CT 628 ¶ 60.

"[T]he exercise of police power may not extend to total prohibition of activity not otherwise unlawful." *Younger*, 96

Cal.App.3d at 406; *accord*, *Frost v. City of L.A.*, 181 Cal. 22, 26–27 (1919) (prohibiting water companies from providing water unless it is "the purest and most healthful obtainable or securable under all the circumstances and conditions," even if the company's water is not harmful, is unconstitutional); *San Diego Tuberculosis Ass'n v. City of E. San Diego*, 186 Cal. 252, 253 (1921) (outlawing hospitals for the treatment of persons afflicted with contagious or infectious diseases violates property right to maintain and conduct the hospital). And while the government has broad authority to regulate land use, it may not eliminate existing rights without a factual showing that this is necessary. *O'Hagen*, 19 Cal.App.3d at 160.

In *Arnel Development Co. v. City of Costa Mesa*, 126 Cal.App.3d 330, 335 (1981), the Court of Appeal found that an ordinance that downzoned property from multifamily to single-family residential failed the rational basis test because it was done "without consideration of the various zoning alternatives or the best utilization of the property." To discriminate against a particular land use without any "reasonable accommodation of the competing regional interests," or any factual basis for finding that the restriction serves the public welfare, is unconstitutional. *Id.* at 340. The fact that the ordinance "completely preclude[d] development of multiple family residences" was proof that it "[did] not effect a reasonable accommodation of the competing interests" and was "therefore not a valid exercise of the police power." *Id.*

The same analysis applies here. Rational basis is a deferential standard—but "judicial deference is not judicial abdication. The ordinance must have a *real and substantial* relation to the public welfare. … There must be a reasonable basis in fact, not in fancy, to support the legislative determination." *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal.3d 582, 609 & n. 26 (1976). The City made no findings to substantiate the assertion that a total prohibition of all STRs would serve any public interest in combating nuisances or threats to public health, safety, or welfare. Instead of facts, it acted on fancy. If there were reason to believe STRs threaten public health, safety, or welfare, "[r]easonable regulation [would be] in order; use prohibition is not." *Younger*, 96 Cal.App.3d at 407. Reasonable regulation would address how homes and units are used or misused, so as to ensure that actions taken by guests in STRs do not harm others.

The City can protect quiet, clean, and safe neighborhoods by, for example, enforcing its already-existing rules that limit noise, parking, and other specific nuisances, or adopting new rules that specify and prohibit new types of nuisances. It could also revoke or phase out licenses for properties that actually cause nuisances. III CT 624–25 ¶¶ 51–52. It did none of these things. Instead, as in *O'Hagen*, it sought to revoke vested rights without any consideration of fault whatsoever, and without any rationally demonstrable connection between that act and the public health, safety, and welfare. As in *Arnel Development*, the City "completely preclude[d]" STRs without any "reasonable

accommodation of the competing interests," 126 Cal. App. 3d at 340, and did so by eliminating the Plaintiffs' vested right to let guests stay in their homes.

Pacific Grove has always been a vacation destination since its founding in 1876 as a summer retreat community.[9] III CT 591 ¶ 2. The elimination of this class of uses is therefore *not* a regulation designed to preserve "the essential character of a neighborhood," *Ewing*, 234 Cal.App.3d at 1591, but a drastic *alteration* of that character by eliminating lawful, permitted uses that are consistent with the historical character of Pacific Grove. *See also Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 847 (11th Cir. 2008) (preserving character of the neighborhood is a legitimate interest, but is not served by regulations that prohibit land uses that are *consistent* with the character of the neighborhood).

Because Measure M bears no reasonable relationship to how the STRs are used, it bears no rational connection to the public's health, safety, or welfare, and deprives Appellants of their vested rights without according them an opportunity to be heard or any procedure for considering the merits of the

[9] These facts distinguish this case from *Ewing v. City of Carmel-By-The-Sea*, 234 Cal.App.3d 1579, 1591 (1991), in which the City prohibited short term residences in one district of the city on the basis of factual findings that showed that such land uses were inconsistent with the traditional character of the neighborhood. Here, tourist vacationing *is* the traditional character of the neighborhood. Also, *Ewing* took pains to note that the ordinance "[did] not seek entirely to ban short-term visitors," which the Pacific Grove ordinance does. *Id.* at 1591.

revocation. On those grounds alone, this Court should reverse the decision below.

CONCLUSION

Appellants respectfully request that this Court *reverse* the trial court's determination with respect to Count II—that Appellants cannot have a vested right for purposes of due process when their permit must be renewed every 12 months—and *remand* for further proceedings consistent with this holding.

DATED: February 25, 2021.

Respectfully submitted,

/s/ *Christina Sandefur*
Timothy Sandefur (224436)
Christina Sandefur*
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Attorneys for Amicus Curiae Goldwater Institute
*Admitted *Pro Hac Vice*

CERTIFICATE OF COUNSEL PURSUANT TO RULE 14(C)

Pursuant to California Rule of Court 14(c)(1), I hereby certify that the foregoing OPENING BRIEF OF APPELLANTS, excluding the tables and certificate, contains 8,262 words, as stated in the word count of the computer program used to prepare the brief.

DATED: February 25, 2021

/s/ *Christina Sandefur*_____
CHRISTINA SANDEFUR

DECLARATION OF SERVICE

I, Christina Sandefur, counsel for Appellants, am over the age of 18 and not a party to this action. My business address is 500 E. Coronado Rd., Phoenix, AZ 85004, and my email address is csandefur@goldwaterinstitute.org.

On February 25, 2021, I served the foregoing Motion electronically by agreement of the parties, to the persons at the electronic addresses listed below.

David C. Laredo, Esq.
Heidi A. Quinn, Esq.
De LAY & LAREDO
606 Forest Avenue
Pacific Grove, CA 93950
dave@laredolaw.net
heidi@laredolaw.net
Counsel for Defendants

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of February 2021, at Phoenix, AZ.

/s/ *Christina Sandefur*